



IN THE

# Supreme Court of the United States

OCTOBER TERM 1945

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PETER A. BUHL, LESTER W. BLUHM, ABEL A. GARFAIN, ISADORE LUPER, HARRY I. HOROWITZ, IRVING C. ROSENBERG, NATHAN ROSENZWEIG, CHARLES B. SALINGER, IRVING N. SOLOWAY and HARRY W. WEINERMAN, on behalf of themselves and all other licensed podiatrists and chiroprodists in the State of New York, similarly situated,

*Petitioners,*

—against—

THE UNIVERSITY OF THE STATE OF NEW YORK, THOMAS J. MANGAN, WILLIAM J. WALLIN, ROLAND B. WOODWARD, WILLIAM LELAND THOMPSON, JOHN LORD O'BRIAN, GEORGE HOPKINS BOND, OWEN D. YOUNG, SUSAN BRANDEIS, C. C. MOLLENHAUER, W. KINGSLAND MACY, JOHN P. MYERS and STANLEY BRADY, as members of the Board of Regents of the University of the State of New York,

*Respondents.*

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## BRIEF IN SUPPORT OF PETITION

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### Opinions Below

The opinion of the Supreme Court, Appellate Division, Third Department of the State of New York, is officially reported in 268 App. Div. 530. A copy of such opinion is annexed to the certified record filed herein (R. 27).

## **Jurisdiction**

The determination of the Appellate Division of the Supreme Court, Third Department, State of New York, now sought to be reviewed was rendered on December 29, 1944 (R. 32, 34); The said Appellate Division denied petitioners' application for leave to appeal to the Court of Appeals, State of New York (R. 36); and the Court of Appeals denied petitioners' application for leave to appeal on May 17, 1945 (R. 38).

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 344, Subdivision b.

## **Statutes Involved**

The subject Regulation #1 promulgated by the Board of Regents, and the Sections of the Education Law of the State of New York, are as follows:

### **"Regulation #1**

1. Fraud and deceit. Fraud or deceit in the practice of podiatry under the Education Law shall include the following:

a. The use of the title 'doctor' with or without the qualification 'podiatrist' or 'chiroprapist' by a licensed podiatrist unless he has earned the degree of doctor of podiatry or doctor of chiropody in accordance with the provisions of Section 1402 of the Education Law; the use by any podiatrist or chiroprapist authorized to practice under the Education Law of New York State

of the title 'doctor' or any abbreviation thereof without the qualification 'podiatrist' or 'chiropractist.'"

Section 1402 of the Education Law of the State of New York (as it is applicable herein):

"Section 1402. Examinations.

No person shall engage in the practice of podiatry in this state except as hereinafter provided, unless he shall have been duly licensed to practice as provided by law."

Section 1412 of the Education Law of the State of New York (as far as applicable) is as follows:

"Any person who shall present to any county clerk for the purpose of registration, any license which has been fraudulently obtained, or shall obtain any license under this article by any false or fraudulent statement or representation, or shall aid and abet in the practice of podiatry within the state without conforming to the requirements of this article, or shall otherwise violate or neglect to comply with any of the provisions of this article, shall be guilty of a misdemeanor, and shall on conviction, for each and every offense be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for a term of not less than thirty days and not more than one year or by both fine and imprisonment. Any person who shall practice podiatry under a false or assumed name or shall falsely personate another practitioner or former practitioner of a like or different name, shall likewise be guilty of a misdemeanor and punished accordingly.

1. The license and registration of a podiatrist may be revoked, suspended or annulled, or such podiatrist, reprimanded, censured or otherwise disciplined in accordance with the procedure prescribed by this article upon proof that such podiatrist
  - (a) Has been convicted of a felony;
  - (b) Has been guilty of fraud or deceit in practice or in securing admission to practice;
  - (c) Is an habitual drunkard or addicted to the use of morphine, opium, cocaine or other drugs having a similar effect;
  - (d) Has undertaken or engaged in any practice beyond the privileges and rights accorded to him in his license;
  - (e) Has practiced without annual registration;
  - (f) Has employed, hired, procured or induced a person not licensed to practice podiatry in this state to so practice;
  - (g) Has aided or abetted in the practice of podiatry a person not licensed to practice podiatry in this state;
  - (h) Has been guilty of untrue, fraudulent, misleading or deceptive advertising;
  - (i) Has advertised for patronage by means of handbills, posters, circulars, stereopticon slides, motion pictures, radio or newspapers; or any other printed publications or mediums; or by means of flamboyant or large display or glar-

ing or flickering signs; or by means of any sign containing as part thereof any representation of the human foot or leg or appliance or any method of treatment;

(j) Has been guilty of unprofessional conduct."

### **Statement of the Case**

A summary statement of the case and of the argument is set forth in the petition and the index.

### **Specification of Errors To Be Urged**

The errors to be urged are identical with the reasons for the allowance of the writ as set forth in the foregoing petition.

### **ARGUMENT**

**The regulation under attack is contrary to and violates the provisions of the Constitution of the United States, Article XIV, Section 1 in that:**

**a—Deprives the petitioners of a right and of property without due process of law, and**

**b—Denies to the petitioners the equal protection of the laws and discriminates against them individually and as a class.**

Concededly, the Legislature of the State, if it saw fit, could enact provisions prohibiting the use of the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" by all persons even though they be duly licensed to practice

such profession, but even the Legislature cannot have any right to make distinctions among the licensees by permitting one group of them the use of such title and prohibiting another group from the use thereof, basing such distinction upon the possession of an academic or collegiate degree.

That the use of the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" (as distinguished from the academic or collegiate degree) is a valuable asset cannot be gainsaid. In the language of the common man the title "doctor" connotes a qualification and distinction which is lacking where such title is not present. That the petitioners are all properly and duly licensed by the State of New York would be beside the question so far as the prospective patient is concerned. In his mind the title "doctor" or "Dr." as a prefix to the name of the practitioner, would act as a halo and the absence thereof would be a positive detriment to one not permitted to use the title—although having the same qualifications and passing through the same ordeal in order to be licensed. Nor is the scope of practice of a licensee enlarged by the use of the title "doctor".

It must be borne in mind that before 1943 the academic or collegiate degree of "doctor of podiatry" did not exist, yet the State deemed the petitioners qualified to take the examination and then license them and such licenses have been registered and renewed and are now in full force and effect.

The Constitution of the State of New York provides as follows:

(RIGHTS, PRIVILEGES AND FRANCHISES SECURED)

SECTION 1: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges

secured to any citizen thereof unless by the law of the land or the judgment of its peers."

(EQUAL PROTECTION BY LAW; DISCRIMINATION AND CIVIL RIGHTS PROHIBITED)

SECTION 11. "No person shall be denied the equal protection of the laws of the state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or any subdivision of the state."

These provisions stem from Amendment XIV, Section 1, of the Constitution of the United States, the pertinent portion of which is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of right, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Not only do the foregoing constitutional provisions prohibit, enjoin and prevent the Legislature itself from adopting and passing discriminatory legislation but necessarily they are with equal force applicable to an administrative body, such as the Board of Regents. Concededly an administrative body may regulate in the interest of public welfare and morals, but such regulation must be within the framework of the constitution, and the basic law from which it stems.



Accordingly, insofar as a licensed podiatrist is prohibited from using the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" by reason of his lacking the academic or collegiate degree of "doctor of podiatry," his liberty is restricted and his capacity to earn fees is lessened, and he is denied the equal protection to which he is entitled. *Smith v. State of Texas*, 233 U. S. 630.

Concededly, the State may in the exercise of its police power and in the interests of health, morals, safety or welfare of the community pass legislation to preserve such interest, and within such limits.

Can a person *licensed* to practice podiatry endanger such interest by using the title "doctor" or "Dr." qualified by "podiatrist" or "chiropodist" simply because he did not have the academic or collegiate degree of "doctor of podiatry"? Conversely are such interests protected by permitting a *licensed* podiatrist to use the title "doctor" or "Dr." merely because he has the collegiate or academic degree of "doctor of podiatry" or "chiropody"?

It thus appears that the regulation passed by the Board of Regents has no reasonable relation to the licensed podiatrists. It has the added vice of drawing distinction between licensees. Such distinction must not be arbitrary, capricious or discriminatory. *Wormsen v. Moss*, 177 Misc. 19, 29 N. Y. S. (2) 798; *Avon Western Corporation v. Wooley*, 39 N. Y. S. (2) 653 (not officially reported).

A regulation within the provisions of law, must be reasonable, and must operate with substantial equality and uniformity on all licensed podiatrists.

"The constitutional requirement of the equal protection of the law undoubtedly permits a wide range of discretion in classifying both persons and things, and the requirement is not violated so long as persons and things similarly situated are similarly treated. But the classification must not be arbitrary and must rest upon some ground of difference having a substantial and reasonable relation to the accomplishment of a legitimate public object." *Russo v. Morgan*, 174 Misc. 1013, 21 N. Y. S. (2) 637; *Avon Western Corporation v. Wooley* (*supra*).

The regulation here involved unlawfully invades the right of every one of the petitioners, all duly licensed podiatrists. So that even if the Legislature itself had enacted such a discriminatory provision it would be the duty of the Court to declare it invalid, and be held unconstitutional and void.

This matter involves the rights of every podiatrist licensed before 1943, the year when the collegiate or academic degree of "doctor of podiatry" was first conferred. There are over 1200 of these licentiates, whose constitutional rights and privileges have thus been invaded. Every one of them, by being licensed, has been recognized by the State of New York as fully qualified to practice his profession; yet every one of them is being discriminated against and deprived of a right, not by Legislative enactment—even though that would be unlawful—but by the circuitous regulation adopted and enforced by the Board of Regents. The Legislature could not grant to an administrative board or quasi judicial tribunal, such as the Board of Regents is, power to create such discrimination or deprive the petitioners of a constitutional right. *Cherry v. Board of Regents*, 289 N. Y. 148.

## CONCLUSION

**For the reasons stated above, the application for a writ of certiorari should be granted.**

Respectfully submitted,

**JACOB W. FRIEDMAN,**  
*Attorney for Petitioners.*

